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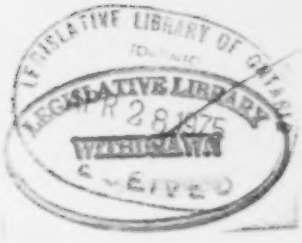
SECOND REPORT
OF THE
CONSUMER PROTECTION PROJECT



CONSUMER GUARANTEES FOR AUTOMOBILES AND MOBILE HOMES

Professor Karl J. Dore
Project Director
Consumer Protection Project
Law Reform Division
Department of Justice
Province of New Brunswick

October, 1974

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FREDERICTON, N.B.

October 15, 1974

Hon. John B.M. Baxter
Minister of Justice
Province of New Brunswick
Fredericton, New Brunswick

Dear Mr. Minister:

It is my pleasure to present the second report of the Consumer Protection Project, which concerns consumer guarantees for automobiles and mobile homes. A general summary of our main recommendations, prepared in English and French, is found starting at page 3.

As I stated in my first report, I have had the good fortune to receive assistance from many persons in this Project, so much, in fact, that I have decided to use "we" rather than "I" in the body of the reports. "We" always means me, and in many cases includes one or more other persons. In this report, I have received particularly valuable assistance from Mr. Gordon Bennett, formerly a solicitor with the Department of Justice, and Mrs. Judith A. Budovitch, student-at-law with the Department of Justice.

Respectfully submitted

Karl J Dore

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Director
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Province of New Brunswick

KJD/jk

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CHAPTER I

GENERAL SUMMARY

OF

MAIN RECOMMENDATIONS

CHAPTER I

GENERAL SUMMARY OF MAIN RECOMMENDATIONS

We set out below a general summary of our main recommendations.

Chapter II: AUTOMOBILES

Safety Inspections

1. Automobile dealers should not be allowed to sell automobiles that cannot pass a safety inspection. The present law, which simply requires that an automobile has been safety-inspected some time during the preceding year, should be changed so that automobile dealers are required to safety-inspect automobiles before selling them.

2. A more comprehensive safety inspection should be required in the sale situation than is required in the present annual safety inspection.

Used Automobile Guarantees

3. In addition to the general guarantees that we have recommended for all goods in the First Report of the Consumer Protection Project, we recommend that automobile dealers should be required to give specific guarantees for used automobiles that are not less then the following:

(a) For all used automobiles, a full guarantee that the automobile meets all applicable New Brunswick and Federal safety standards at the date of delivery.

(b) For used automobiles sold at a price that exceeds $500 but is less than $1,000, a full guarantee, subject to the exceptions listed below, that the automobile and its components are in good working order and will, with normal use and servicing, remain in good working order for a period of 1 month from delivery or 1,000 miles, whichever occurs first.

(c) For used automobiles sold in the price range from $1,000 to $2,000, a full guarantee, subject to the exceptions listed below, that the automobile and its components are in good working order and will, with normal use and servicing, remain in good working order for a period of 2 months from delivery or 2,000 miles, whichever occurs first.

(d) For used automobiles sold at a price that exceeds $2,000, a full guarantee, subject to the exceptions listed below, that the automobile and its components are in good working order and will, with normal use and servicing, remain in good working order for a period of 3 months from delivery or 3,000 miles, whichever occurs first.

(e) The guarantees set out in (b), (c) and (d) above, do not apply to any of the following:

(i) any defect that the dealer believes to exist in the automobile and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(ii) damage caused after delivery by abuse, negligence, or accident;

(iii) normal maintenace services and replacement of service items made in connection with normal maintenance services;

(iv) damage caused by the purchaser not having normal maintenance services performed;

(v) interior trim and external appearance items;

(vi) clocks, radios, tape players, refrigerated air conditioners, and other prescribed accessories;

(vii) batteries;

(viii) tires and tubes.

4. An automobile dealer should not be allowed to take a guarantee against defects from his consumer seller, or to take an indemnity from his consumer seller for any liability he (the automobile dealer) bears to his consumer buyer.

New Automobile Guarantees

5. In addition to the general guarantees that we have recommended for all goods in the First Report of the Consumer Protection Project, we recommend that automobile dealers should be required to give specific guarantees for new automobiles that are not less than the following:

(a) A full guarantee that the automobile meets all applicable New Brunswick and Federal safety standards at the date of delivery.

(b) Subject to the exceptions listed below, a full guarantee against defects

in design, materials and workmanship, in normal use and with normal servicing, for a period of 12 months from delivery or 12,000 miles, whichever occurs first.

(c) The guarantee set out in (b) above does not apply to any of the following:

(i) any defect that the dealer believes to exist in the automobile and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(ii) damage caused after delivery by abuse, negligence, or accident;

(iii) normal maintenance services and replacement of service items made in connection with normal maintenance services;

(iv) damage caused by the purchaser not having normal maintenance services performed.

Chapter III: MOBILE HOMES

Used Mobile Home Guarantees

6. In addition to the general guarantees that we have recommended for all goods in the First Report of the Consumer Protection Project, we recommend that mobile home dealers should be required to give specific guarantees for used mobile homes that are not less than the following:

(a) A full guarantee that the mobile home complies with applicable New Brunswick and Federal statutes and regulations establishing standards of quality and safety.

(b) Subject to the exceptions listed below, a full guarantee that the mobile home is in a good state of repair and fit for habitation and will, with normal use and maintenance, remain in a good state of repair and fit for habitation for a period of 3 months from delivery.

(c) The guarantee set out in (b) above does not apply to any of the following:

(i) any defect that the dealer believes to exist in the mobile home and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(ii) damage caused after delivery by abuse, negligence, or accident;

(iii) normal maintenance services, and damage caused by the purchaser not having normal maintenance services performed;

(iv) furniture and appliances that are not built-in;

(v) defects that affect only appearance - e.g. scratches.

7. A mobile home dealer should not be allowed to take a guarantee against defects from his consumer seller, or to take an indemnity from his consumer seller for any liability he (the mobile home dealer) bears to his consumer buyer.

New Mobile Home Guarantees

8. In addition to the general guarantees that we have recommended for all goods in the First Report of the Consumer Protection Project, we recommend that mobile home dealers should be required to give specific guarantees for new mobile homes that are not less than the following:

(a) A full guarantee that the mobile home complies with applicable New Brunswick and Federal statutes and regulations establishing standards of quality and safety.

(b) Subject to the exceptions listed below, a full guarantee against defects in design, materials and workmanship, in normal use and with normal maintenance,

for a period of 1 year from delivery.

(c) The guarantee set out in (b) above does not apply to any of the following:

(i) any defect that the dealer believes to exist in the mobile home and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(ii) damage caused after delivery by abuse, negligence, or accident;

(iii) normal maintenance services, and damage caused by the purchaser not having normal maintenance services performed;

(iv) furniture and appliances that are not built-in.

CHAPITRE I

RÉSUMÉ GÉNÉRAL
DES
PRINCIPALES RECOMMANDATIONS

CHAPITRE I

RÉSUMÉ GÉNÉRAL DES PRINCIPALES RECOMMANDATIONS

Nous présentons ci-dessous un résumé général de nos principales recommandations.

Chapitre II: AUTOMOBILES

Inspection de sécurité

1. Il devrait être interdit aux concessionnaires d'automobiles de vendre des automobiles qui ne peuvent subir avec succès l'inspection de sécurité. La loi actuelle, qui prescrit simplement qu'une automobile soit soumise à l'inspection de sécurité à une date quelconque pendant l'année précédente, devrait être modifiée de façon à obliger les concessionnaires à ne vendre que des automobiles qui ont subi avec succès l'inspection de sécurité.

2. Dans le cas d'une vente, il y aurait lieu d'exiger une inspection de sécurité plus complète que celle qui est présentement requise chaque année.

Garanties sur les automobiles d'occasion

3. Outre les garanties générales que nous avons recommandées sur tous les objets dans le Premier rapport de l'étude sur la protection des consommateurs, nous recommandons que les concessionnaires d'automobiles devraient être tenus de donner sur les automobiles d'occasion tout au moins les garanties particulières suivantes:

a) sur toutes les automobiles d'occasion, une garantie pleine et entière que l'automobile, à la date de la délivrance, répond à toutes les normes de sécurité du Nouveau-Brunswick et du Canada.

b) sur les automobiles d'occasion dont le prix de vente est supérieur à $500 et inférieur à $1,000, une garantie pleine et entière sous réserve des exceptions énoncées ci-dessous, que l'automobile et ses pièces composantes sont en bon état de fonctionnement et le demeureront, dans les conditions normales d'utilisation et d'entretien, pendant un mois à compter de la date de la délivrance ou pour 1,000 miles, selon que l'une ou l'autre éventualité se produira la première.

c) sur les automobiles d'occasion dont le prix de vente s'échelonne entre $1,000 à $2,000, une garantie pleine et entière sous réserve des exceptions énoncées ci-dessous, que l'automobile et ses pièces composantes sont en bon état de fonctionnement et le demeureront dans les conditions normales d'utilisation et d'entretien, pendant deux mois à compter de la date de la délivrance ou pour 2,000 miles, selon que l'une ou l'autre éventualité se produira la première.

d) sur les automobiles d'occasion dont le prix de vente est supérieur à $2,000, une garantie pleine et entière sous réserve des exceptions énoncées ci-dessous, que l'automobile et ses pièces composantes sont en bon état de fonctionnement et le demeureront, dans les conditions normales d'utilisation et d'entretien, pendant trois mois à compter de la date de la délivrance ou pour 3,000 miles, selon que l'une ou l'autre éventualité se produira la première.

e) les garanties énoncées aux alinéas b), c) et d) ne s'appliquent pas aux cas suivants:

(i) tout défaut que le concessionnaire croit avoir décelé dans l'automobile et dont, de la façon prescrite, il fait part à l'acheteur en lui faisant un devis estimatif raisonnable des frais de réparation. Toutefois, si les frais raisonnables de réparation sont supérieurs à ceux du devis estimatif, le consommateur peut recouvrer la différence du concessionnaire;

(ii) tout dommage postérieur à la délivrance et consécutif à un traitement excessif, à la négligence ou à un accident;

(iii) le service normal d'entretien et le remplacement de pièces à l'occasion du service normal d'entretien;

(iv) tout dommage provenant du fait que l'acheteur n'a pas soumis l'automobile à un service normal d'entretien;

(v) les articles de garniture intérieure et de décoration extérieure;

(vi) les horloges, radios, magnétophones, climatiseurs et autres accessoires prescrits;

(vii) les batteries;

(viii) les pneus et chambres à air.

4. Le concessionnaire d'automobile ne devrait pas être autorisé à obtenir de son vendeur une garantie contre les défauts d'une automobile ni à percevoir de ce vendeur une indemnité couvrant la responsabilité du concessionnaire envers l'acheteur.

Garanties sur les automobiles neuves

5. Outre les garanties générales que nous avons recommandées sur tous les objets dans le Premier rapport de l'étude sur la protection des consommateurs, nous recommandons que les concessionnaires d'automobiles devraient être tenus de donner sur les automobiles neuves, tout au moins les garanties particulières suivantes:

a) une garantie pleine et entière que l'automobile, à la date de la délivrance, répond à toutes les normes de sécurité du Nouveau-Brunswick et du Canada.

b) sous réserve des exceptions énoncées ci-dessous, une garantie pleine et entière

contre tout défaut dans la conception, les matériaux et la fabrication, dans les conditions normales d'utilisation et d'entretien, pendant douze mois à compter de la date de la délivrance ou pour 12,000 miles, selon que l'une ou l'autre de ces éventualités se produira la première.

c) la garantie énoncée à l'alinéa b) ne s'applique pas aux cas suivants:

(i) tout défaut que le concessionnaire croit avoir décelé dans l'automobile et dont, de la façon prescrite, il fait part à l'acheteur en lui faisant un devis estimatif raisonnable des frais de réparation. Toutefois, si les frais raisonnables de réparation sont supérieurs à ceux du devis estimatif, le consommateur peut recouvrer la différence du concessionnaire;

(ii) tout dommage postérieur à la livraison et consécutif à un traitement excessif, à la négligence ou à un accident;

(iii) le service normal d'entretien et le remplacement de pièces à l'occasion de ce service;

(iv) tout dommage provenant du fait que l'acheteur n'a pas soumis l'automobile au service normal d'entretien.

Chapitre III: MAISONS MOBILES

Garanties sur les maisons mobiles d'occasion

6. Outre les garanties générales que nous avons recommandées sur tous les objets dans le Premier rapport de l'étude sur la protection des consommateurs, nous recommandons que les concessionnaires de maisons mobiles devraient être tenus de donner sur les maisons mobiles d'occasion tout au moins les garanties particulières suivantes:

a) Une garantie pleine et entière que la maison mobile répond aux prescriptions des lois et règlements applicables du Nouveau-Brunswick et du Canada fixant des normes de qualité et de sécurité.

b) Sous réserve des exceptions énoncées ci-dessous, une garantie pleine et entière que la maison mobile est en bon état de réparation et habitable et que, dans les conditions normales d'utilisation et d'entretien elle le demeurera pendant trois mois à compter de la date de la délivrance.

c) La garantie énoncée à l'alinéa b) ne s'applique pas aux cas suivants:

(i) tout défaut que le concessionnaire croit avoir décelé dans la maison mobile et dont, de la façon prescrite, il fait part à l'acheteur en lui faisant un devis estimatif raisonnable des frais de réparation. Toutefois, si les frais raisonnables de réparation sont supérieurs à ceux du devis estimatif, le consommateur peut recouvrer la différence du concessionnaire;

(ii) tout dommage postérieur à la livraison et consécutif à un traitement excessif, à la négligence ou à un accident;

(iii) le service normal d'entretien, et les dommages provenant du fait que l'acheteur n'a pas soumis la maison mobile au service normal d'entretien;

(iv) les meubles et appareils non fixés à demeure;

(v) les défauts ne concernant que l'apparence; par exemple, des rayures.

7. Le concessionnaire de maisons mobiles ne devrait pas être autorisé à obtenir de son vendeur une garantie contre les défauts d'une maison mobile ni à percevoir de ce vendeur une indemnité couvrant la responsabilité du concessionnaire envers l'acheteur.

Garanties sur les maisons mobiles neuves

8. Outre les garanties générales que nous avons recommandées sur tous les objets dans le Premier rapport de l'étude sur la protection des consommateurs, nous recommandons que les concessionnaires de maisons mobiles neuves devraient être tenus de donner sur les maisons mobiles tout au moins les garanties particulières suivantes:

a) une garantie pleine et entière que la maison mobile répond aux prescriptions des lois et règlements applicables du Nouveau-Brunswick et du Canada fixant des normes de qualité et de sécurité.

b) sous réserve des exceptions énoncées ci-dessous, une garantie pleine et entière, dans les conditions normales d'utilisation et d'entretien, contre tout défaut dans la conception, les matériaux et la fabrication, pendant un an à compter de la date de la délivrance.

c) les garanties énoncées à l'alinéa b) ne s'appliquent pas aux cas suivants:

(i) tout défaut que le concessionnaire croit avoir décelé dans la maison mobile et dont, de la façon prescrite, il fait part à l'acheteur en lui faisant un devis estimatif raisonnable des frais de réparation. Toutefois, si les frais de réparation sont supérieurs à ceux du devis estimatif, le consommateur peut recouvrer la différence du concessionnaire;

(ii) tout dommage postérieur à la livraison et consécutif à un traitement excessif, à la négligence ou à un accident;

(iii) le service normal d'entretien et tout dommage provenant du fait que l'acheteur n'a pas soumis la maison mobile à ce service;

(iv) les meubles et appareils non fixés à demeure.

CHAPTER II

AUTOMOBILES

CHAPTER II

AUTOMOBILES

1. INTRODUCTION

In our First Report[1] we made recommendations for fundamental reform of the law with respect to consumer guarantees in the sale or supply of goods. We also stated that in the next report we would examine more carefully two particularly important contracts for the sale of goods, automobiles and mobile homes, to see if in some instances it would be desirable and practical to lay down more specific guidelines than those that we have recommended for the sale of goods generally.

1. First Report of the Consumer Protection Project: Consumer Guarantees in the Sale or Supply of Goods (Department of Justice, New Brunswick, April, 1974).

For most consumers, the purchase of an automobile or a mobile home is second in size and importance only to the purchase of a house. Because of this, and because automobiles and mobile homes have been high complaint areas in New Brunswick and elsewhere, we think it is very important that the law should provide the consumer with as much protection as is possible. Furthermore, what is impractical for the sale of goods generally may nevertheless be practical for certain goods, particularly the expensive goods. For example, when we discussed the desirability and practicality of a statutory term relating to spare parts and reasonable repair facilities, we took the position that this would be impractical for the sale of goods generally, but we recommended that for automobiles and mobile homes there should be an implied term that spare parts and reasonable repair facilities will be available for a reasonable period of time.[2] What we are concerned with here is whether the law can and should go still further in making refinements in mandatory guarantees for automobiles and mobile homes. We shall deal with automobiles in this chapter and with mobile homes in the next chapter.

2. Ibid., at pp. 84-87, 102.

We shall deal first with safety-related defects and then with non-safety-related defects.

2. SAFETY-RELATED DEFECTS

We have already recommended in the First Report that there should be a mandatory term in consumer contracts that the goods will comply with applicable New Brunswick and Federal statutes and regulations establishing standards of quality and safety of goods.[3]

Our view, that safety is as much a matter of public concern as it is of private concern, is clearly reflected in the present law governing automobiles, both Federal and Provincial. It is our understanding that, at a 1969 meeting of Federal and Provincial officials in Fredericton, it was agreed that the Federal Government should assume responsibility concerning the safety of new and imported automobiles, and that the Provincial Governments should assume responsibility concerning the safety of used automobiles and replacement parts. Actually, by this time New Brunswick had already launched

3. Ibid., at pp. 87-88, 102-103.

a major program dealing with automobile safety. A short time later, the Federal Parliament enacted the Motor Vehicle Safety Act,[4] which we shall briefly describe first.

(a) Motor Vehicle Safety Act

The effect of this Act, and the complementary legislation under New Brunswick's Motor Vehicle Act,[5] is to give authority to the Federal Government to establish mandatory safety standards for motor vehicles manufactured, imported or sold in New Brunswick. As far as possible, the legislation attacks the problem of new motor vehicle safety at the manufacturer's level. The standards can cover "the design, construction or functioning of motor vehicles and their components for the purpose of protecting persons against personal injury, impairment of health or death" (s.2(1)). Mandatory minimum safety standards have already been prescribed.[6] Naturally, it is hoped that these standards will be improved as time goes by.

4. R.S.C. 1970, c.26 (1st Supp.), proclaimed effective January 1, 1971, SOR/71-19.

5. The Motor Vehicle Act 1955, S.N.B. 1955, c.13, as am., s.207D, as en. S.N.B. 1973, c.59 and proclaimed August 1, 1973.

6. Motor Vehicle Safety Regulations, SOR/70-487, as am.

If our recommendation - that there should be a mandatory term in consumer contracts that the goods will comply with applicable New Brunswick and Federal statutes and regulations establishing standards of quality and safety - is implemented, then the dealer will be contractually responsible to the consumer for the automobile meeting the safety standards imposed by the Motor Vehicle Safety Act and the regulations thereunder.

In addition to the setting of minimum safety standards, the Act also requires a manufacturer who becomes aware of a defect in construction, design or functioning that affects or is likely to affect the safe operation of an automobile to give notice of the defect. The notice must be given to his purchaser, any known subsequent purchaser now covered by his warranty, and the Minister of Transport. The Minister of Transport, in turn, is to give notice to the officer responsible for motor vehicle administration in each Province. The notice must contain a description of the defect, an evaluation of the safety risk related to the defect, and a statement of the means to be taken to correct the defect (s.8).

(b) New Brunswick's Safety Legislation[7]

1969 saw the introduction of a compulsory annual safety inspection for passenger vehicles in use in this Province and, as is stated in the Provincial Secretary's Report for that year, this surely must have been instrumental in removing many unsafe vehicles from our highways. Indeed, contrary to the normal case, passenger vehicle registration for that year actually declined.

Vehicles that fail to pass the annual safety inspection must be repaired or else taken off the highways. The regulations under the Motor Vehicle Act prescribe the standards that a vehicle must meet in order to pass the safety inspection, and specify what the inspection is to include. The standard of condition that a vehicle must meet is that it be equipped as required under the Motor Vehicle Act, and "that it be in such operating condition that it would offer no obvious hazard to a person or property while in use" (s.5(7)). The scope of the safety check includes an inspection of the following:

7. The Motor Vehicle Act 1955, S.N.B. 1955, c.13, as am., ss.221-223; N.B. Reg. 69-33, as am.

(a) the autobody;

(b) the windshield and windows;

(c) the horn;

(d) the windshield wipers;

(e) the rearview mirror;

(f) the lighting systems;

(g) the exhaust system;

(h) the braking systems;

(i) the steering system;

(j) the suspension system; and

(k) the wheels and tires.

An Official Motor Vehicle Inspection Station Manual establishes procedures and standards that the testing stations must comply with.

The safety inspection stations are not Government operated, but are privately operated garages and service stations that are licensed by the Government to conduct the safety checks. The stations are allowed to charge a fee of four dollars for performing a safety inspection.

A passenger vehicle must undergo a safety inspection each year. In addition, no passenger vehicle can be sold unless the vehicle is equipped with a current approval

certificate of inspection before sale (for this purpose, however, a trade-in of a vehicle is not treated as a sale (s.9)). Thus the purchaser of a passenger vehicle already obtains some benefits from the safety inspection system. The question we now turn to is whether those benefits are sufficient.

Under the present law, the dealer's liability to the purchaser with respect to the safety inspection is unclear, even in the case where the dealer has himself performed the safety inspection immediately prior to the sale. The only reported New Brunswick case on this problem, L.G. Wilson Motors Ltd. v. Woods,[8] involved a sale of used cars by one car dealer to another car dealer at an auction. The seller's mechanics performed a safety inspection shortly before the vehicles were put up for sale and issued a safety certificate for each of them. Before attending the auction, the purchaser inquired whether the vehicles had been safety-inspected, and was informed that they had been. It turned out that two of the vehicles had safety-related defects that had not been detected in the safety inspection. Some

8. (1970), 2 N.B.R. (2d) 581 (N.B. Sup. Ct.).

of these defects could have been detected by the inspection that was required, but others could not have been detected by the required safety inspection. As far as the safety inspection was concerned, there could of course be no liability for defects that could not be detected on the required inspection. Thus, in this case, although the brake lining on a wheel of one car was badly worn, this would not be revealed if the inspector had selected one of the other wheels to check (only one wheel has to be checked under the New Brunswick regulations). Mr. Justice Dickson went on to state:[9]

> "The only question really involved here is whether or not the existence of those defects in the Buick and Mercury cars which might have been disclosed on the inspection amounted to breach of a warranty ...
>
> In my view if any warranty was in fact given in respect of these vehicles it was only that they had been inspected and certified, which in fact had been done. Such a process was a prerequisite to sale of the vehicles. I cannot see that in the circumstances the warranty amounted to guaranteeing that the inspections had been perfectly performed ..."

Taken literally, the learned Justice's statement that any warranty here would be "only that they (the cars)

9. Ibid., at p.584.

had been inspected and certified", would mean that the warranty would not cover the manner in which the inspection was performed, and in particular whether the inspection was performed with reasonable care and skill. However, his other statements would indicate that he did not wish to be taken literally on this statement. In fact, Mr. Justice Dickson pointed out that the mechanics who carried out the inspection were competent and qualified, and that an official of the Motor Vehicle Branch testified that, although the defects would have shown up on a "careful inspection", he did not regard the failure to discover the defects as negligent. The Judge also regarded these defects as "rather trivial": one car had slightly too much tolerance on one ball joint, and the other car had a door latch that was sticking, a rusted hole in the trunk floor that was covered up with masking tape and painted, and too much tolerance in the steering drag link.

If our recommendations concerning safety standards were implemented, and if a dealer could sell only passenger vehicles that meet the standards prescribed for the safety inspection, then the dealer would be

contractually responsible to the purchaser for the automobile meeting the standards prescribed for the safety inspection. However, there is no requirement that a dealer sell only passenger vehicles that can pass the safety inspection. There is only a requirement that the passenger vehicle be equipped with a current approval certificate of inspection before sale. Since a safety certificate is good for one year, the mere fact that a used automobile bears a current approval certificate gives no assurance whatever that it is in safe condition. In fact, the automobile may have been inspected many months before and since then may have suffered deterioration or abuse rendering it now unsafe. Indeed, a very common reason for a person to dispose of his automobile is that it suffers from mechanical defects. It seems clear to us, therefore, that as a minimum reform measure the law should require a dealer to safety-inspect the automobile before he sells it, rather than continue the existing provision which simply requires that the automobile has been safety-inspected some time during the preceding year.[10]

10. It is our understanding that a recent policy directive from the Department of the Provincial Secretary requires that automobiles sold for less than five hundred dollars must be re-inspected before the registration can be transferred, unless they have been safety-inspected during the last thirty days.

The last point leads to a more general question and that is the difference in situations between the person who is having a safety inspection performed on an automobile that he himself is driving, and the situation where he is selling the automobile. It appears to us that the annual safety inspection is in the nature of a spot check system. This approach seems reasonable when one considers the time, inconvenience and expenses of the test, especially when it is remembered that this is an annual inspection and that one can assume that, in most cases, an owner of an automobile would not subject himself to the possibility of a serious accident by driving what he knows to be an unsafe vehicle. But it seems to us that the situation differs significantly when it comes to the sale of an automobile. The person who has been driving the automobile, and who is familiar with its servicing and maintenance history, no longer has the same self-interest in its safety because he will not be driving it himself. Indeed, as has been pointed out already, he may be selling the automobile because of its mechanical deterioration. That deterioration may not show up on a spot check system

and may not be known by the new purchaser. We therefore question whether a more comprehensive safety inspection is not called for in the sale situation than is in the annual check-up situation.

We, of course, hardly need emphasize that the precise scope and procedures of safety inspections are beyond our competence to judge. Expert advice would have to be taken. But even non-experts like ourselves can see that the present system could stand improvement. For example, the annual safety inspection requires only that one wheel be removed to check the brake linings of an automobile. In Ontario, however, all wheels must be removed.[11] In our view, a more comprehensive safety inspection should be required in the sale situation than is required in the annual safety inspection.

11. R.R.O. 1970, Reg. 410, s.3. See also Henzel v. Brussels Motors Ltd. (1972), 31 D.L.R. (3d) 131 (Ont. Co. Ct.).
To put this in proper perspective, we are of the opinion that on the whole, the New Brunswick system of motor vehicle inspection is superior to that of Ontario, because Ontario's legislation is restricted in application to the sale situation. There is no annual safety inspection requirement in Ontario; there is only a requirement that an automobile undergo a safety inspection before sale.

We would go even further. We would, for the reasons stated in our First Report, make an automobile dealer contractually responsible to the consumer purchaser for all safety-related defects, whether or not they are detectable on whatever safety inspection is required by law.[12] We would emphasize, however, that this does not mean that there is no need for a formal safety inspection. When it comes to safety, it is not sufficient that someone be responsible to pay the damages if something goes wrong. More positive steps must be taken to ensure that safety-related defects do not exist. Furthermore, safety goes beyond buyer and seller and affects innocent third persons as well. Finally, the minimum standards required under safety inspections are of assistance in resolving the very important problems of durability of various parts of the automobile.

12. First Report, at pp.87-88, 141-150. See also pp. 69-71, infra.

3. NON-SAFETY-RELATED DEFECTS

The question of non-safety-related defects is more difficult.

(a) Some Fundamental Problems

We recommended in our First Report, for the sale of goods generally, mandatory implied terms as to quality including:

1. A requirement that the goods be of such quality and in such state or condition as it is reasonable to expect having regard to any description applied to them, the price (if relevant), and all the other relevant circumstances; no protection to be given with respect to defects that the seller points out to the consumer, or that the consumer knows of, before the contract is made.
2. A requirement that the goods be fit for all the purposes for which goods of that kind are ordinarily used, in the absence of a clear indication to the contrary.
3. A requirement that the goods (and their components, in cases where the goods consist of more

than one component) be durable for a reasonable period of time. In determining what is a reasonable period of time, the price and all the other circumstances should be considered.[13]

As we took pains to point out in our First Report, our recommendations for mandatory implied terms as to quality would not protect the buyer from all defects. Goods may be defective and yet still satisfy the quality requirements. This is because we have deliberately formulated a flexible proposal that is designed to reflect the reasonable expectations of the parties, which differ according to the circumstances. The seller may avoid responsibility for a particular defect in the goods by pointing out that defect before the contract is made. Nor would the buyer receive protection from defects that he is aware of from his own examination of the goods before the contract is made. The seller may also avoid what would otherwise be a responsibility, to some extent at least, by his general description of the goods. For example, if the seller describes the goods as "used" his responsibility would be less than if he had described them as "new". Or, to take another

13. First Report, at pp.69-90, 100-103.

example, goods described as "seconds" would require a lower standard of quality than the same goods without this qualifying description.

Our general approach to non-safety-related defects is not that they should not exist. The fact that goods have defects, or that they are not of first class quality, is not necessarily undesirable. Such goods may be precisely what the consumer wants, if the price is right. Rather, our general approach is to give the consumer protection from unknown defects. It is only when he knows what he is getting that the consumer can make an informed decision on whether he should buy the goods at the price requested.

The consumer by no means receives perfect protection from the unknown under our proposals, however. There are practical obstacles that prevent this. We do not think it would be reasonable to require in every case that a seller actually show the consumer exactly what defects there are in the goods he is selling if he is to avoid liability. In many cases, all that can reasonably be required is that the seller indicate by way of a general description that something is wrong - e.g.

"scratch and dent" sales, smoke damage sales, soiled merchandise sales. Proposals designed for the sale of goods generally must accommodate these cases. And, if mandatory, as our proposals are, even more care must be taken to ensure that they have the necessary built-in flexibility.

There is an even more fundamental problem. It is not always clear what is a defect. Quality, especially as it relates to durability, is a relative concept. Hence, proposals designed for the sale of goods generally must have flexibility if they are to reflect the reasonable expectations of the parties, which vary depending on the circumstances. If they do not have flexibility, if they are overly rigid and specific, they will not be appropriate for all cases. For example, in our view, it is impossible to set a fixed and certain mandatory minimum durability period, say thirty days, that would fit all cases and offer neither too much nor too little protection for the consumer. If one is covering all cases, one must have flexibility. We believe our proposals for the sale of goods generally have the necessary built-in flexibility. But flexibility has its price, and that is uncertainty.

Can and should the law provide the consumer with better and more certain protection with respect to non-safety-related defects in automobiles than what we have already recommended for the sale of goods generally? Such increased protection could take one of two different approaches. The first approach would be to require the goods to meet certain standards, e.g. be in good working order, which is the approach we have adopted for safety-related defects. The second approach would be to continue to allow non-safety-related defects, but provide better and more certain protection against unknown defects.

(b) Standards Approach

The standards approach has been taken in the farm implements legislation of four Canadian Provinces.[14] Under this legislation, a dealer who sells a new farm implement must undertake responsibility that the goods are in good working order and will have reasonable durability. The dealer cannot avoid responsibility for this even if he were to point out a particular defect and say that the buyer would have to have that defect fixed himself.

14. Alberta: The Farm Implement Act, R.S.A. 1970, c.136, as am.; Manitoba: The Farm Machinery and Equipment Act, C.C.S.M., c.F40, en. by 1971, c.83, as am.; Prince Edward Island: The Farm Implement Act, S.P.E.I. 1968, c.49; Saskatchewan: The Agricultural Implements Act, 1968, S.S. 1968, c.1, as am.

An example of this kind of approach as it relates to automobiles in particular is found in legislation that was recently proposed, but not enacted, in California.[15] The proposed Used Automobile Warranty Act would apply to retail sales of used automobiles. The Act would create a series of warranty ratings - A, B and C - and require automobiles sold for a price exceeding one thousand dollars to carry one of these warranty ratings. An "A" warranty rating is defined by the Act to mean that the automobile is fully warranted by the dealer to be free from mechanical defects for a period of not less than one hundred and twenty days from the date of delivery to the purchaser or four thousand miles, whichever occurs first; in addition, the engine and drive train are fully warranted for one hundred and eighty days from the date of delivery to the purchaser or six thousand miles, whichever occurs first. A "B" warranty rating is defined to mean that the automobile is fully warranted to be free from mechanical

15. Assembly Bill No. 3495, as amended in Assembly June 5, 1974. The Bill was referred to the Committee on Transportation, where it died. We are indebted to Ms. Christine Ford, staff analyst in the California Department of Consumer Affairs, for sending us a copy of the Bill and information on its subsequent fate.

defects for a period of not less than ninety days or three thousand miles, whichever occurs first. And a "C" warranty rating is defined to mean that the engine and drive train are fully warranted for a period of not less than sixty days or two thousand miles, whichever occurs first. Engine and drive train are defined to include cylinder block, head, all internal engine parts, water pump and intake manifold; electrical equipment necessary for engine operation, including starter and ignition system; transmission case and all internal transmission parts including torque converter; propeller shaft and universal joints; drive axle, differential, and axle shafts; and other items as determined by departmental regulation.

The Act would not apply to a vehicle that has a mechanically inoperative engine or drive train due to the absence of a major component or a major mechanical defect in the engine or drive train. And the warranties provided by the Act would not apply to any of the following: (1) normal maintenance services such as engine tune-up, fuel system cleaning, carbon or sludge removal; (2) brake adjustments, and wheel alignment and balancing

(except as necessary in connection with the repair or replacement of steering, ball joints and related equipment); (3) the replacement of service items made in connection with normal maintenance services; (4) interior trim and external appearance items; (5) clocks, radios, batteries, tires and tubes; (6) other items as determined by departmental regulation. The Department of Motor Vehicles would also have authority in certain cases to adjust the cash price at which a warranty rating "C" or higher is required and to exempt certain specified makes and models of used automobiles from the warranty requirements.

Although the A, B, C warranty rating requirements would not apply to vehicles sold for a price of one thousand dollars or less, the Act would provide some protection to the purchaser of such an automobile. The purchaser of such an automobile would receive a mandatory guarantee that the vehicle meets all applicable federal and state safety requirements, including those for lights, brakes, windshield, glass, mirrors, windshield wipers, horn, muffler and exhaust system, emission standards, seat belts and tires.

(c) Disclosure Approach

This was the approach recommended by the Law Council of Australia in its Report on Fair Consumer Credit Laws.[16] The Report recommended a mandatory guarantee in the sale of used cars at a price exceeding five hundred dollars whereby the seller would be liable for the cost of repairing mechanical or structural defects that were neither disclosed nor known to the consumer at or before the time of sale. The duration of this mandatory guarantee would be three months or three thousand miles, whichever occurs first. It should also be noted that these proposals are additional to, not in substitution of, the Report's recommendations for implied terms as to quality in the sale of goods generally. Thus, there would always be the possibility that a consumer who could not bring himself within the terms of the special automobile guarantee could nevertheless bring himself within the more general guarantee for all goods.

The Report also recommended that before a used

16. Report on Fair Consumer Credit Laws to the Attorney-General for the State of Victoria by a Committee of the Law Council of Australia (Melbourne, 1972), paras. 5.2.1-5.2.6.

automobile could be sold, it should be required to undergo prescribed tests that would cover those areas where defects, whether safety-related or non-safety-related, were both important and discoverable. A "roadworthiness certificate", which would give the results of these tests, would be given to the consumer before the sale. The consumer would thus have a better idea of what he was getting. The State of Wisconsin has recently adopted an approach that is similar to this recommendation.[17]

The most refined version of a disclosure approach to automobiles, at least to our knowledge, was first suggested in a Report by a Committee of the University of Adelaide Law School.[18] The refinement consists of

17. Wisconsin Administrative Code, Motor Vehicle Trade Practices, Chapter MVD 24, s.24.03(5), effective October 1, 1974. We are indebted to Mr. Don Krohn, Supervisor, Dealer Section, Division of Motor Vehicles, Department of Transportation, State of Wisconsin, for sending us a copy of departmental rule MVD 24.

18. Report on the Law Relating to Consumer Credit and Moneylending (1969, The Law School, University of Adelaide), c.13. See also Trebilcock, A New Approach to the Protection of Used Car Buyers (1972), 18 McGill Law Journal 258. Professor Trebilcock was a member of the Adelaide Law School Committee. It may be of some interest to note that their approach was inspired by provisions in Justinian's Corpus Juris on used slave sales.

requiring a dealer not only to disclose the defects but to give an accurate estimate of the cost of repairing the defects. This approach has since been adopted in the legislation of South Australia and New South Wales.[19]

South Australia's Second-hand Motor Vehicles Act, 1971[20] makes a used car dealer liable for defects that appear within a certain time period, unless he has disclosed the defect in question to the buyer in the prescribed manner and has given an accurate estimate of the cost of repairing that defect. If he has not disclosed the defect, he is responsible for the repair of the vehicle "so as to place that vehicle in a reasonable condition having regard to its age". If he

19. The New South Wales legislation, which is very recent, has not yet been proclaimed. We understand that similar legislation is in operation in Western Australia and awaits proclamation in Victoria, but we were not able to obtain copies of the legislation in time for this report. We also understand that similar legislation is being considered in Tasmania and the Australian Capital Territory. This information was provided to us by Mr. L.H. Baker, South Australian Commissioner for Prices and Consumer Affairs, in a letter dated September 27, 1974.

20. S.S.A. 1971, No. 111, ss.24-25, effective April 1, 1972.

has disclosed the defect but has not done so in the prescribed manner, he will be under the same responsibility. If he has disclosed the defect and has done so in the prescribed manner but has not given an accurate estimate of the cost of repair, then he is responsible for the difference between his estimate and the actual fair cost of repair.

The length of the statutory mandatory guarantee varies with the purchase price of the automobile. The provision does not apply at all to automobiles sold for five hundred dollars or less. For automobiles sold at a price that exceeds five hundred dollars but is less than one thousand dollars, the guarantee is for three thousand kilometres or two months, whichever comes first. For automobiles sold for one thousand dollars or more, the guarantee is for five thousand kilometres or three months, whichever comes first. These monetary limits may be changed by regulation.

The statutory guarantee does not apply to every vehicle or to every defect. We have already mentioned the exclusion of automobiles sold for five hundred

dollars or less. Another exemption is any vehicle or class of vehicle exempted by the Commissioner (who is the government official responsible for the administration of the Act). To date the Commissioner has exempted a number of classes of vehicles, all of which, however, are fully imported models not assembled in Australia.[21] Neither does the statutory guarantee apply to tires, batteries, or other prescribed accessories. To date the prescribed accessories are radios, tape players and refrigerated air conditioning units.[22] Also exempted is a vehicle that has been in the purchaser's possession for a period of at least three months immediately preceding the sale. Commercial vehicles are also exempted. (Commercial vehicle is defined to mean a vehicle constructed or adapted solely or mainly for (a) the carriage of goods; (b) the carriage of persons exceeding ten in number; or (c) industrial or agricultural use; but does not include a vehicle, being a derivative of a passenger vehicle, commonly called a utility or panel van (s.4)). Finally, and as might be expected, the seller is not responsible for defects arising from accidental damage after sale or from misuse or negligence on the purchaser's part.

21. Second-hand Motor Vehicles Sales Regulations, 1972

22. Ibid., s.8.

The draftsmen of the Act took care to lay down precisely when and how a valid disclosure can and must take place. For example, a dealer can successfully disclose only those defects that he believes to exist in the automobile. Thus, he could not avoid the intent of the legislation by simply preparing a long list of possible defects without regard to whether or not he believed a particular automobile actually had these defects. To successfully disclose, the seller must:

1. Prepare a notice in the prescribed form setting out with reasonable particularity any defect that he believes to exist in the vehicle, and his estimate of the fair cost of repairing the defect(s).
2. Ensure that the notice is attached to the vehicle at all material times.
3. See that the buyer signs a copy of the notice at or before the time of sale and, upon sale, give the buyer a copy of the notice.

The regulations[23] set out in detail the form of the required notice, a sample copy of which is shown on the next page of this Report. The form must be on white

23. Ibid., s.4, and Second Schedule.

NOTICE OF DECLARED DEFECTS

DEALER .....

BUSINESS ADDRESS .....

REGISTERED NUMBER OF VEHICLE .....

YEAR OF FIRST REGISTRATION ..... MODEL .....

MAKE AND TYPE ..... ENGINE NO. .....

ODOMETER READING MILES/KILOMETRES .....

The cost of repairs up to the estimate shown for each item remains the responsibility of the purchaser. The dealer may only be liable for the cost of repair in excess of the estimate and for any defects not listed.	ESTIMATED COST OF REPAIR
ENGINE AND COOLING SYSTEM—	$
.....	.....
.....	.....
.....	.....
BRAKES—	
FOOT ..... HAND	.....
TRANSMISSION—	
CLUTCH	.....
GEARBOX	.....
DIFFERENTIAL	.....
DRIVE SHAFT ASSEMBLIES	.....
ELECTRICAL—	
LIGHTS	.....
STARTER	.....
GENERATOR/ALTERNATOR	.....
INSTRUMENTS	.....
SUSPENSION AND STEERING—	
.....	.....
BODY—	
.....	.....
ANY OTHER DEFECTS—	
.....	.....
.....	.....
.....	.....
TOTAL	.....

SIGNATURE OF PURCHASER .....

SIGNATURE OF DEALER .....

DATE .....

THE ABOVE DEALER IS LEGALLY REQUIRED TO FURNISH YOU WITH A SIGNED COPY OF THIS NOTICE

paper, it must be of a certain size, and the printing thereon must not be smaller than that shown on the sample copy reproduced on the preceding page. The notice is to be in triplicate. The original must be affixed to the side window of the vehicle and in such a way as to be clearly visible. The second and third copies of the notice are to be signed by both seller and buyer, and each is to retain one copy.

The Act also provides that nothing in it is to take away other rights that the buyer would have under the law (s.36), so that there remains the possibility that a buyer who has no rights under this Act could still have rights under the law relating to merchantability (or quality) and fitness for purpose. It should be noted, however, that the mandatory implied terms as to quality and fitness provided by South Australia's Consumer Transactions Act, 1972-1973 do not apply to second-hand vehicles.[24]

Very recently, New South Wales enacted the Motor Dealers Act, 1974,[25] which provides for a mandatory

24. Consumer Transactions Act, 1972-1973, S.S.A. 1972, No. 135, S.S.A. 1973, No. 8, s.8(7).

25. The Act has not yet been proclaimed.

guarantee in the sale of used automobiles that is very similar to the South Australian legislation. The Act itself is not yet back from the printer, but the New South Wales Consumer Affairs Council kindly sent us a copy of a summary of the legislation and, from the summary, it appears that the only difference between the New South Wales and the South Australian legislation, as far as used automobile guarantees are concerned, is that the New South Wales statutory guarantee does not apply to damage to paintwork or upholstery "which would have been apparent on a reasonable inspection carried out at the time of sale".

However, the New South Wales legislation is broader in scope than the South Australian legislation. The New South Wales legislation also provides for a mandatory guarantee in the sale of new automobiles. The guarantee is basically the same as that for used automobiles,[26] except that its duration is twenty thousand kilometres or twelve months, whichever occurs first.

26. The paintwork and upholstery exception, referred to in the preceding paragraph, does not apply to new automobiles.

(d) Reactions to These Approaches

As might be expected, there are widely divergent reactions to these various approaches.

We used the good offices of Mr. John T. Clark, Chairman of the Legislative Committee of the New Brunswick Automobile Dealers Association, to obtain some idea of the views of New Brunswick automobile dealers on what might be done for better consumer protection in the automobile field. We specifically asked for reactions to the proposed California legislation and the South Australian-New South Wales legislation. There was a definite negative reaction to both pieces of legislation, and a particularly strong negative reaction to the South Australian-New South Wales legislation. The feeling was that such legislation would result in a terrific price increase in used cars and would be difficult to administer, because in many cases dealers themselves could not be sure whether a car had particular defects.

One dealer suggested the following proposal as an alternative:

1. On cars sold for less than one thousand dollars, there should be no mandatory guarantee.
2. On cars sold for one thousand dollars or more, there should be a mandatory fifty-fifty power train warranty whose duration would be tied to the purchase price of the automobile as follows:
   (a) thirty days or one thousand miles, whichever comes first, on cars sold between one thousand dollars and one thousand five hundred dollars;
   (b) sixty days or two thousand miles, whichever comes first, on cars sold between one thousand five hundred dollars and two thousand five hundred dollars;
   (c) ninety days or three thousand miles, whichever comes first, on cars sold over two thousand five hundred dollars.

The refinement of requiring an estimate of the cost of repair of disclosed defects was not thought to be practicable by the Committee of the Law Council of Australia either.[27] However, it should be noted that

27. Report on Fair Consumer Credit Laws to the Attorney-General for the State of Victoria by a Committee of the Law Council of Australia (Melbourne, 1972), para. 5.2.5.

their proposals for a mandatory guarantee are much more broad in terms of coverage and duration than those suggested in the preceding paragraph.[28]

We also wrote to the South Australian Commissioner for Prices and Consumer Affairs, Mr. L.H. Baker, to get some idea of how the South Australian legislation was working out in practice. He kindly sent us a copy of a speech delivered by Mr. Jim Freeman, Chairman of the Used Car Committee of the South Australia Automobile Chamber of Commerce, which is so topical that we have decided to reproduce it in its entirety in the Appendix.[29] In his speech, Mr. Freeman points out that South Australian automobile dealers were "horrified" when they first learned of the proposed legislation. But, after seeing how it works out in practice, he said that "the legitimate dealer has nothing to fear ...". The shady dealer, on the other hand, has "virtually disappeared". And, although dealer reconditioning and warranty costs have gone up, they have been much less than originally anticipated. Indeed, he said that decreased advertising costs more than offset these increased costs, so that dealers were actually making more profit per unit working under the new law.

28. See pp. 48-49, supra.

29. See pp. 81-85, infra.

(e) Our Views and Recommendations

We turn now to our own views.

In our view, the law can and should provide more protection and more certainty in guarantees for automobiles than it provides in the sale of goods generally. The size and importance of the transaction makes it feasible to go further as far as protection is concerned. And, of course, it is in the interests of both dealers and consumers that the law be as certain as possible.

It is also obvious, however, that even within the relatively narrow field of automobiles, as contrasted to goods generally, the range of available products is very wide. Proposals designed to apply across the board to all automobiles would have to have much less rigorous specifics than proposals designed to apply to subgroups within the spectrum. For example, proposals that are practical for new automobiles may not be practical for used automobiles. Even this very basic subgrouping, into new and used automobiles, is very crude. Used automobiles, in particular, run the gamut from the two hundred dollar "clunker" to the very

expensive, slightly used demonstrator. In short, we see again in miniature the problems encountered in formulating proposals designed for all goods generally.

The point we are making is that, while the law can have more specific guarantees for automobiles than it has for the sale of goods generally, there will always be a need for a residual general test in the absence of sufficient subgrouping within the field of automobiles itself. And, although we have some hopes for the future in standards setting and grading systems in this area, we see no way, at least at present, to arrive at a situation where the law can assure completely certain and specific guarantees by sufficiently subgrouping so that neither too much nor too little protection is given.

We would not, therefore, abandon the general tests that we have formulated for all goods generally, which have the necessary built-in flexibility to fit each particular case. Rather, the specific proposals that follow are meant to be additional to our general tests.

We shall deal first with used automobiles and then with new automobiles.

(i) Used Automobiles

Used automobiles, of course, present the greatest difficulties because they are more likely to have something wrong with them. Some of the defects are major, while others are minor. Again, there may be a problem of determining what is a defect. A used automobile, by definition, has had some use, which in turn must cause some wear and tear. When does wear and tear become a defect?

If the consumer is to be protected against all defects except those that have been disclosed, there is the problem of the practicality of disclosing every defect no matter how small. The practicality problem becomes worse if the seller is required to give an estimate of the cost of repairing defects as well. And, if the seller is required to render an automobile free of defects, this may not be feasible economically. All these problems become even worse once durability is brought in.

These problems have not gone unnoticed by those who have proposed or made changes in this area. The Adelaide Law School Committee Report, for instance,

stated that by defects it meant defects in parts that are essential to the reasonable use of the automobile; the trifling was to be completely excluded. The South Australian legislation does not define a defect, but conveys some impression of what is meant by declaring the dealer's liability for defects to be "to place that vehicle in a reasonable condition having regard to its age". Furthermore, the South Australian legislation specifically excludes protection from defects occurring in the tires, battery, or prescribed accessories (accessories prescribed to date are radios, tape players, and refrigerated air conditioning units). Even so, the Chairman of the Used Car Committee of the South Australia Automobile Chamber of Commerce has stressed that the main problem with the South Australian legislation is determining what is a defect. He would like to see the term dropped altogether and have substituted in its place "unserviceable item or part".[30] New South Wales has legislation that is very similar to South Australia, the only difference being that the legislation of New South Wales also excludes protection from damage to paintwork or upholstery which would have been apparent on a reasonable inspection carried out at the time of sale. The Report of the Committee of the Law Council

30. See Appendix, at p. 84.

of Australia speaks of "mechanical" or "structural" defects. And, finally, the proposed California legislation excludes from protection a number of things, including brake adjustments, tires and tubes, wheel alignments and balancing, interior trim and external appearance items, clocks, radios, batteries, and other items as determined by departmental regulation.

If the law is to give fixed and certain guarantees in the used automobile area, it seems very clear to us that certain defects, particularly "cosmetic defects", will have to be excluded from protection under these guarantees. The precise scope of defects that should be covered depends, in our view, on the kind of protection (i.e. whether standards oriented or disclosure oriented) and the duration of that protection.

At present, we favour the disclosure approach over the standards approach to non-safety-related defects. We do, of course, favour the standards approach for safety-related defects. We also believe that a more rigorous disclosure approach will encourage better quality standards in the non-safety area. But we are not convinced that it is necessary for the law to actually require better quality standards for used

automobiles in the non-safety area, or what is really more accurate, to require the kind of quality standards that we are presently able to set. We wish to protect the consumer from unknown defects, and to make the disclosure requirements much more rigorous, along the lines of the South Australian legislation. But we would leave the rest to normal market forces. If the consumer knows what he is getting, and has a free choice in the matter, he can decide for himself what he wants.

Fixing a definite minimum duration for a mandatory guarantee is perhaps the most difficult problem of all. A thirty day guarantee, and then only fifty-fifty, appears to be the present prevailing practice in New Brunswick in those cases where express guarantees are given on used automobiles. Longer periods have been adopted or proposed for reform legislation in other jurisdictions. We would suggest that the reform legislation in New Brunswick adopt the following scheme for a minimum duration:

1. For automobiles sold at a price that exceeds five hundred dollars but is less than one thousand dollars, a period of one month or one thousand miles, whichever occurs first;

2. For automobiles sold in the price range from one thousand dollars to two thousand dollars, a period of two months or two thousand miles, whichever occurs first; and

3. For automobiles sold at a price that exceeds two thousand dollars, a period of three months or three thousand miles, whichever occurs first.

We recognize, of course, that any fixed and certain time periods are bound to be arbitrary to some extent.

We would exclude from the specific guarantees automobiles sold for a price of five hundred dollars or less. The purchaser of such an automobile would, however, still receive protection under the general guarantees that we recommended for all goods. And, of course, he would receive protection under the safety guarantee that we recommended earlier in this Report.

On balance, therefore, we recommend the following specific mandatory minimum guarantees for used automobiles:

1. For used automobiles sold at a price that exceeds five hundred dollars but is less than one thousand dollars, there should be a full guarantee,

subject to the exceptions listed below, that the automobile and its components are in good working order and will, with normal use and servicing, remain in good working order for a period of one month from delivery or one thousand miles, whichever occurs first.

2. For used automobiles sold in the price range from one thousand dollars to two thousand dollars, there should be a full guarantee, subject to the exceptions listed below, that the automobile and its components are in good working order and will, with normal use and servicing, remain in good working order for a period of two months from delivery or two thousand miles, whichever occurs first.

3. For used automobiles sold at a price that exceeds two thousand dollars, there should be a full guarantee, subject to the exceptions listed below, that the automobile and its components are in good working order and will, with normal use and servicing, remain in good working order for a period of three months from delivery or three thousand miles, whichever occurs first.

4. The guarantees set out in 1, 2 and 3 above, do not apply to any of the following:

(a) any defect that the dealer believes to exist in the automobile and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(b) damage caused after delivery by abuse, negligence, or accident;

(c) normal maintenance services and replacement of service items made in connection with normal maintenance services;

(d) damage caused by the purchaser not having normal maintenance services performed;

(e) interior trim and external appearance items;

(f) clocks, radios, tape players, refrigerated air conditioners, and other prescribed accessories;

(g) batteries;

(h) tires and tubes.

We would stress again that these recommendations for specific guarantees are in addition to, not in substitution for, the general guarantees that we have recommended for all goods in the First Report. They represent the minimum responsibilities that we believe should be imposed on automobile dealers, not the maximum. A consumer who cannot bring himself within the terms of these specific guarantees may nevertheless be able to bring himself within the general guarantees that we have recommended for all goods, which have the necessary built-in flexibility to fit the circumstances of each particular case.

We recognize that our proposals would place obligations on New Brunswick automobile dealers that they may consider to be unduly onerous. We are encouraged, however, by the other comments that we have received on the South Australian legislation, which we have used as the basic model for our own recommendations. And, while we do not wish to rehash all of our reasoning in our First Report, we do wish to refer back to two particular points.

First, the dealer is in a much better position than the consumer to detect defects. If he detects defects, he can either (1) refrain from buying the goods, or (2) buy the goods at a reduced price and, after disclosing the defects to the consumer, sell the goods at a reduced price, or (3) buy the goods at a reduced price, repair the defects, and sell the goods at a price that includes the cost of repairing the defects. We suspect that in many (perhaps most) cases the dealer would exercise the third option.

Second, even with respect to defects that are latent and undetectable, the dealer is in a much better position than the consumer to handle the risks of these defects. One likely method he might use to handle these risks would be to increase his prices on all his used automobiles so as to cover these costs. If this were done, all purchasers of used automobiles would, in effect, pay a small insurance premium for the legislative protection. In our view, this is much better than the present system which places all the risks and costs on the shoulders of those individual consumers who were unlucky enough to purchase one of the defective automobiles.

Furthermore, if the law were to excuse the dealer from liability for undetectable defects, there would be great practical difficulties. Take an engine for example. As was stated in the Adelaide Law School Committee Report, "it would in many cases be impossible to determine whether a defect appearing late in the three month period could have been discovered some months earlier, for the condition of the engine will, ex hypothesi, have changed. Moreover, dealers would be in a strong position to bluff consumers on this point."[31]

Another method the dealer might use to handle the risks of unknown defects would be to decrease the price he pays on his own purchases of used automobiles from consumers. One thing we would not allow him to do, however, is to take an indemnity from his consumer seller for any liability he might bear to his consumer buyer.[32]

31. Report on the Law Relating to Consumer Credit and Moneylending (1969, The Law School, University of Adelaide), at p.47.

32. The legislation of South Australia does not allow this either: "Where a dealer incurs any costs or expenses by virtue of the operation of this Act in relation to the sale of a second-hand vehicle, the dealer shall not be entitled to be indemnified in respect of those costs or expenses by any antecedent owner, other than a trade owner, of that vehicle and any purported contract or agreement of such indemnity shall, by force of this section, be void and of no effect": Second-hand Motor Vehicles Act, 1971, S.S.A. 1971, No. 111, s.38.

Not only is the dealer in a better position to handle the risks of unknown defects vis-a-vis the consumer buyer, he is also in a better position to handle these vis-a-vis his consumer seller.

(ii) New Automobiles

New automobiles present a much easier case to deal with. We recommend the following specific mandatory minimum guarantee for new automobiles:

1. For new automobiles, there should be a full guarantee, subject to the exceptions listed below, against defects in design, materials and workmanship, in normal use and with normal servicing, for a period of twelve months from delivery or twelve thousand miles, whichever occurs first.
2. This guarantee does not apply to any of the following:
   (a) any defect that the dealer believes to exist in the automobile and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(b) damage caused after delivery by abuse, negligence, or accident;

(c) normal maintenance services and replacement of service items made in connection with normal maintenance services;

(d) damage caused by the purchaser not having normal maintenance services performed.

Again, we recommend that this specific guarantee be in addition to, not in substitution for, the general guarantees that we have recommended for all goods.

CHAPTER III

MOBILE HOMES

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MOBILE HOMES

1. INTRODUCTION

For the same reasons that we advanced for automobiles, we also believe that the law can and should provide more protection and more certainty in guarantees for mobile homes than it provides in the sale of goods generally. Indeed, if anything, it is even more important to give increased protection in the mobile home area because we are dealing with an even more basic essential, a consumer's living quarters.

An important step forward was taken last spring with the enactment of the Mobile Homes Act,[1] and again later in the summer with the passing of regulations that require mobile homes constructed after August 31, 1974,

1. Mobile Homes Act, S.N.B. 1974, c.31, not yet proclaimed.

to comply with Canadian Standards Association construction standards.[2] The CSA standards cover structural requirements, plumbing requirements, gas equipment, oil heating requirements, and electrical requirements. If the recommendation in our First Report - that there should be a mandatory term in consumer contracts that the goods will comply with applicable New Brunswick and Federal statutes and regulations establishing standards of quality and safety - is implemented, then the mobile home dealer will be contractually responsible to the consumer for the mobile home meeting the CSA standards.

We would adopt the same approach to mobile homes as we have recommended for automobiles. Thus, in addition to the protection given by the CSA standards, and without limiting in any way the general guarantees we recommended for all goods, we recommend the following specific mandatory minimum guarantees for mobile homes. Again, we have found it necessary to distinguish between used mobile homes and new mobile homes.

2. N.B. Reg. 74-122.

2. USED MOBILE HOMES

(a) For used mobile homes there should be a full guarantee, subject to the exceptions listed below, that the mobile home is in a good state of repair and fit for habitation and will, with normal use and maintenance, remain in a good state of repair and fit for habitation for a period of three months from delivery.

(b) This guarantee does not apply to any of the following:

(i) any defect that the dealer believes to exist in the mobile home and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(ii) damage caused after delivery by abuse, negligence, or accident;

(iii) normal maintenance services, and damage caused by the purchaser not having normal maintenance services performed;

(iv) furniture and appliances that are not built-in;

(v) defects that affect only appearance - e.g. scratches.

Again, the same as for automobiles, we would not allow the dealer to take an indemnity from his consumer seller for the liability that he will bear to his consumer buyer.

3. NEW MOBILE HOMES

(a) For new mobile homes, there should be a full guarantee, subject to the exceptions listed below, against defects in design, materials and workmanship, in normal use and with normal maintenance, for a period of one year from delivery.

(b) This guarantee does not apply to any of the following:

(i) any defect that the dealer believes to exist in the mobile home and, in the prescribed manner, discloses and gives his fair estimate of the cost of repair thereof. If the fair cost of repair is greater than the estimate, however, the consumer can recover the difference from the dealer;

(ii) damage caused after delivery by abuse, negligence, or accident;

(iii) normal maintenance services, and damage caused by the purchaser not having normal maintenance services performed;

(iv) furniture and appliances that are not built-in.

APPENDIX

APPENDIX

HOW SOUTH AUSTRALIAN DEALERS HAVE COPED WITH THE SECONDHAND MOTOR VEHICLES ACT: A speech by Mr. Jim Freeman, Chairman of the Used Car Committee of the South Australia Automobile Chamber of Commerce to his colleagues in the Victoria Automobile Chamber of Commerce (Printed in the VACC Journal, March 1973, pp.35-36)

Gentlemen:

Perhaps the most important thing I have to tell you is that I have been personally involved with the used car business since 1930. In fact, the first mistake I made in an appraisal was of a light Ford in 1932 and I've been making them ever since.

First, let me tell you a little of the history of the Secondhand Motor Vehicles Act in South Australia. The SAACC Used Car Dealer Division held a meeting in 1969 to decide how we could properly answer the complaints which were common in newspapers, etc., and reports by the Royal Automobile Association which had ultimately indicated to all and sundry that the used car dealers were a mob of thieves, rogues and vagabonds. The Chamber took up the challenge to answer these strong complaints and, I regret to say, the automobile association was able to give documented proof of the many people who had been taken for a ride by some dealers.

In SA we have a Prices and Consumer Affairs Branch and the Prices Commissioner decided to take an active interest in used car dealing. The SAACC called a meeting of some 80 members of the Used Car Dealer Division and decided that the best thing to do was to clean up the industry.

DEPUTATION

From this meeting a deputation was sent to the Liberal Government who promised an investigation, but they didn't remain in power long enough to carry this out. In the meantime you (VACC) produced the draft of the Motor Car Traders' Act and we seized on this and used it as a basis of our approach to the Labor Government's Attorney-General. We originally wanted only some legislation which would, in effect, de-licence dealers who deceived the public. We wanted to get rid of the blackguards.

The majority of dealers wanted this as the real reason for discontent was in the advertising sphere.

The Big Time Charlies were drowning us out with high volume advertising. The Government appointed a committee of enquiry to gather evidence of what was wrong and decide what should be done to rectify the matter. After the draft legislation had been prepared, the Rogerson Report had been included concerning defects and, let's face it, we were horrified to find it in there and almost decided to oppose the legislation. We estimated that warranty would cost $200 per car but the Government said they would have this clause in the Act or no Act! We eventually got some modifications to this clause which is basically the same as your proposal. The Legislation became law on April 1st last year. The major difference between our law and your proposed one is that you will have a Motor Car Traders' Committee to receive the complaints while we have the situation where the buyer has to first contact the dealer and then go to the Commissioner for Consumer Affairs if he is still dissatisfied. The Officers of the Prices Branch then sift the evidence and decide the necessary action. If the dealer and the buyer agree to a compromise the question is settled. If not, the matter goes before the Courts.

THE IMMEDIATE EFFECTS:

After the Bill became law on April 1st, cars priced between $500 and $700 virtually disappeared off the lots. Even now there is a complete vacuum in the $500-$600 range. High mileage cars dropped in value up to $250 and you'll look hard to find a high mileage car for sale in Adelaide. Low mileage cars rose in value from $100-$250. Reconditioning costs crept up, warranty costs, pre-service and free repairs jumped, but not by as much as we thought they would. Most of us expected around $80.00 per car but this has been nearer to $10. In our own case it has been approximately $5 per car. Advertising costs dropped dramatically. People who were used to spending $50-$60 per car came back to $25-$30 and franchised dealers who did not use the full page spreads cut their costs back from $35 to $15 a unit.

One of the biggest problems is how are you going to handle the customer complaints and I can assure you that this is no small job of work. You can leave it to your used car manager to do the job the way you dictate it, because if he is left to do it on his own he will be a "hero deluxe" if he doesn't get you into trouble because of the complexity of the thing. My used car manager had the idea that the best thing to do was to promote a lily-white image of purity, honesty and benevolence but I had to call him in and tell him that I don't want something that is going to cost the earth.

Your law calls for rectification of defects, the same as ours, with due regard to mileage and age of the vehicle and that is the curly question. You will find that everyone thinks that the warranty should cover everything from a soft shock absorber to a leaky radiator or a muffler that blows out two months after delivery. You can gain a halo by replacing parts everywhere, but you will be in trouble financially.

We thought that proving abuse by the owner was another tragedy in the Law as a larrikin in a GT type car could go fox hunting with it and then come back and say it fell to pieces in normal driving. This hasn't happened as the Prices Branch officers are smart enough to kick them right out of court because they have confidence in the dealer's submissions.

The Prices Branch has a full-time staff of five looking into complaints and they've found that only about 35% of the complaints are legitimate. I would like to stress that the main problem associated with the law is the word "defect". The RAA people here regard every fault as a defect and it is hard to define the term. Anything would be better than that word "defect" and I would advise you to have it changed in your legislation to "unserviceable item or part". With the RAA it is either perfect or it is a defect, there isn't any middle course for them.

THE LAW IN PRACTICE

Now I'll give you an example of the working effects of the law. Say you have a car for sale at $1,150 and Joe Blow comes in and says, "I'll give you $1,000 for it and you can scrub the guarantee." This is just not on. He cannot do this and you certainly cannot do it. The obvious thing, you would think would be to write a defect notice and put it on the windscreen, but if he took you to court afterwards you wouldn't have a leg to stand on because the law says the defect notice must have been there at all material times. The SA Prices Branch says that the only way out of it is to send him away, put the defect notice on the car and let him come back the next day! I say again, get rid of that word "defect" from your act if you can!

One other small point is that we had our windscreen stickers showing previous owner, year of first registration, mileage, etc., printed on red paper. This is a mistake as the red fades and your prospect doesn't need to be a mind reader to work out that you've had the brute in stock for a long time!

I have some figures which will interest you concerning costs since our law came to pass in April.

One dealership which keeps very accurate records supplied them to us. Sales for December 1971 were 180 units with reconditioning costs of $93.00 per unit, policy adjustments $1.57, advertising $30.36.

After the sales slump in April and May they picked up again and we were given average costs for a three month period. Reconditioning dropped to $82.79, policy adjustments went up to $3.42 and advertising dropped to $25.00 per unit.

In the three months July-September reconditioning went up to $107 and policy (warranty) adjustments rose to $6.40, but the significant drop was in advertising, which was now down to $16.48. The moral is that the decreased advertising costs outweighed the increases in reconditioning and warranty - even with the word "defect" still in our law! We were actually making more profit per unit.

The other points are that the advertising is more credible, the rogues and vagabonds have virtually disappeared and the last of them will go out of business as soon as their list of misdemeanors have been accumulated by the Licencing Board.

The legitimate dealer has nothing to fear from the proposed legislation.